

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ROBERT H. KELLY AND WIFE,
MARY KELLY

VS.

D. B. INDUSTRIES, INC.

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CIVIL ACTION NO. 1:07-cv-00137

DEFENDANT'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, D.B. INDUSTRIES, INC., Defendant in the above-entitled and numbered cause and files this its Response and Answer to Plaintiffs' Original Complaint:

I.

1. Defendant, D.B. INDUSTRIES, INC., is without sufficient information or knowledge to form a belief as to the truth of the allegations made in paragraph I of Plaintiffs' Original Complaint with respect to the residence of Plaintiffs and can neither admit or deny these allegations at this time.
2. Defendant, D.B. INDUSTRIES, INC., admits that it is a Minnesota corporation domiciled in Minnesota and that its registered agent in Texas is C.T. Corporation System. Defendant denies the remaining allegations in paragraph I of Plaintiffs' Original Complaint.
3. Defendant, D.B. INDUSTRIES, INC., admits upon alleged information that there appears to be diversity of citizenship between Plaintiffs and Defendant but denies the remaining allegations in paragraph II of Plaintiffs' Original Complaint.

4. Defendant, D.B. INDUSTRIES, INC., is without sufficient information or knowledge to form a belief as to the truth of the allegations made in paragraph III of Plaintiffs' Original Complaint and can neither admit or deny these allegations at this time.
5. Defendant, D.B. INDUSTRIES, INC., is without sufficient information or knowledge to form a belief as to the truth of the allegations made in paragraph IV of Plaintiffs' Original Complaint and can neither admit or deny these allegations at this time.
6. Defendant, D.B. INDUSTRIES, INC., is without sufficient information or knowledge to form a belief as to the truth of the allegations made in paragraph V of Plaintiffs' Original Complaint and can neither admit or deny these allegations at this time.
7. Defendant, D.B. INDUSTRIES, INC., is without sufficient information or knowledge to form a belief as to the truth of the allegations made in paragraph VI of Plaintiffs' Original Complaint and can neither admit or deny these allegations at this time.
8. Defendant, D.B. INDUSTRIES, INC., is without sufficient information or knowledge to form a belief as to the truth of the allegations made in paragraph VII of Plaintiffs' Original Complaint and can neither admit or deny these allegations at this time. Defendant denies that it breached any implied warranty of merchantability or implied warranty of suitability for a particular purpose.
9. Defendant, D.B. INDUSTRIES, INC., denies the allegations in paragraph VIII of Plaintiffs' Original Complaint.
10. Defendant, D.B. INDUSTRIES, INC., denies the allegations in paragraph IX of Plaintiffs' Original Complaint.
11. Defendant, D.B. INDUSTRIES, INC., denies the allegations in paragraph X of Plaintiffs' Original Complaint.

12. Defendant, D.B. INDUSTRIES, INC., denies the Prayer of Plaintiffs' Original Complaint and says that Plaintiffs are not entitled to any relief from D.B. INDUSTRIES, INC. as far as this Defendant is concerned.

II.

DEFENSES

13. Defendant, D.B. INDUSTRIES, INC., would show that Plaintiff's own negligence was a proximate cause and/or sole proximate cause of the incident in question and pleads the doctrine of proportionate responsibility.

14. In the alternative, Defendant, D.B. INDUSTRIES, INC., would show that the proximate cause of the incident in question was solely caused by the conduct and breach of some party other than this Defendant and over whom this Defendant possessed no right of control and for whose acts this Defendant in law not responsible.

15. In the alternative, Defendant, D.B. INDUSTRIES, INC., pleads the affirmative defense of unavoidable accident.

16. The Plaintiffs' alleged injuries are the result, in whole or in part, of pre-existing, and/or subsequent conditions neither caused or contributed to by the accident made the basis of this suit.

17. Defendant, D.B. INDUSTRIES, INC., pleads that Plaintiff or Plaintiff's employer misused the alleged product.

18. Defendant, D.B. INDUSTRIES, INC., pleads the state of the art defense as that term is known and used in Texas law.

19. Defendant, D.B. INDUSTRIES, INC., pleads that this Court should dismiss the claims asserted against it under Rule 12(b)(2) and 12(b)(3) for improper venue.

20. Defendant, D.B. INDUSTRIES, INC., denies that venue is proper in the Eastern District of Texas, Beaumont Division, pursuant to 28 U.S.C. §1391.

21. Defendant, D.B. INDUSTRIES, INC., pleads that venue of this case should be transferred to the Southern District - Houston Division under 28 U.S.C. §1404(a) and 1406(a).

22. Defendant, D.B. INDUSTRIES, INC., pleads that this case should be dismissed under the doctrine of forum non conveniens. All events giving rise to Plaintiffs' claims occurred in the Western District and most of the witnesses are in the Southern District or Western District or outside the State of Texas.

23. Defendant, D.B. INDUSTRIES, INC., pleads that Plaintiffs' Complaint fails to state a cause of action against this Defendant upon which relief can be granted.

24. Defendant, D.B. INDUSTRIES, INC. would further show that if Plaintiffs settle with any alleged tortfeasor that Defendant is entitled to any and all offsets and credits allowed under the statutory and common laws of the state of Texas.

25. Defendant, D.B. INDUSTRIES, INC., would show that according to Section 18.091 of the Texas Civil Practice & Remedies Code, Plaintiffs' alleged earnings, loss of earning capacity, loss of contributions of a pecuniary value, and/or loss of inheritance must be presented in the form of a net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal and/or state income tax law.

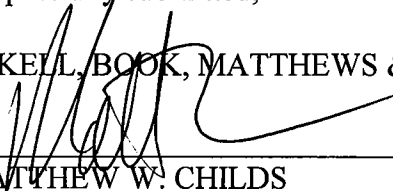
26. Defendant, D.B. INDUSTRIES, INC., would show that according to Section 41.0105 of the Texas Civil Practice & Remedies Code, the recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of Plaintiffs.

27. Defendant, D.B. INDUSTRIES, INC., demands a trial by jury for all matters which may be tried pursuant to Rule 38.

WHEREFORE, PREMISES CONSIDERED, Defendant, D.B. INDUSTRIES, INC., prays that Plaintiffs' Original Complaint be denied and that Plaintiffs take nothing by reason of this litigation and that Defendant, D.B. INDUSTRIES, INC., have all relief, whether general or special, at law or equity, to which this Defendant may be justly entitled.

Respectfully submitted,

TEKELL BOOK, MATTHEWS & LIMMER, L.L.P.



MATTHEW W. CHILDS
State Bar No. 04202050
1221 McKinney, Suite 4300
Houston, Texas 77010-2010
(713) 222-9542 TELEPHONE
(713) 655-7727 TELEFAX

ATTORNEY FOR DEFENDANT,
D.B. INDUSTRIES, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this the 8 day of May, 2007, true and correct cop(ies) of the foregoing instrument were forwarded to all counsel of record via electronic filing through the Court's Pacer System as listed below:



Matthew W. Childs

Steven C. Barkley
Attorney at Law
3560 Delaware, Suite 305
Beaumont, Texas 77706